

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**  
Norfolk Division

RECARLO L. FLAX, #318185,

Petitioner,

v.

ACTION NO. 2:05CV352

GENE M. JOHNSON, Director of the  
Virginia Department of Corrections,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254.

The petition alleges violation of federal rights pertaining to petitioner's convictions for rape and animate object penetration on January 27, 2003, in the Circuit Court of the County of Fairfax, as a result of which he was sentenced to serve two concurrent terms of forty years imprisonment, with twenty years suspended on each, in the Virginia penal system.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. Report of the Magistrate Judge was filed on September 29, 2005, recommending dismissal of the petition. By copy of the report, each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On November 14, 2005, the Court received Petitioner's Objections to the Report and Recommendation.

The Court, having reviewed the record and examined the objections filed by the petitioner

to the United States Magistrate Judge's Report, and having made de novo findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the Report of the United States Magistrate Judge filed September 29, 2005. It is, therefore, ORDERED that the petition be DENIED and DISMISSED, because petitioner's claims are barred by the statute of limitations, his claim of actual innocence is not based on newly discovered evidence, and equitable tolling is inappropriate.

It is further ORDERED that judgment be entered in favor of the respondent.

Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right," therefore, the Court declines to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003).

Petitioner is hereby notified that he may appeal from the judgment entered pursuant to this Final Order by filing a written notice of appeal with the Clerk of this court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within 30 days from the date of entry of such judgment.

The Clerk shall mail a copy of this Final Order to petitioner and counsel for the respondent.

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/s/  
WALTER D. KELLEY, JR.  
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia  
December 22, 2005